Supreme Court, U.S.
FILED
JUN 24 2004
OFFICE OF THE CLERK

No. 03-1706

IN THE

Supreme Court of the United States

AVI BART MARKOWITZ,

Petitioner,

v.

BRIDGET MARY MARKOWITZ,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEXAS SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Can the comments of a trial judge showing outright favoritism for a party in a family law case become so pervasive and evident that there is a violation of the Due Process Clause of the United States Constitution?

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To the Supreme Court of the United States:

Avi Bart Markowitz files this Petition for Writ of Certiorari. The Petitioner will be referred to as "Avi". The Respondent will be referred to as "Bridget."

OPINIONS BELOW

This case originated in the trial courts of the State of Texas. The trial court issued a final judgment in the case, summarized in Appendix B. The case was appealed to the Court of Appeals in Texas, which issued a published opinion. *Markowitz v. Markowitz*, 118 S.W.3d 82 (Tex. App. – Houston [14th Dist.] 2003). That opinion is included as Appendix A. The Texas Supreme Court denied a Petition for Review (Appendix E), and denied rehearing (Appendix F).

STATEMENT OF JURISDICTION

Jurisdiction of the Court is founded on 28 U.S.C. § 1257. Under Rule 10 of the Supreme Court Rules, this Court should grant this Petition. The decision of the state courts in Texas, decided important questions of federal law that had not been, but should be, settled by this Court.

CONSTITUTIONAL PROVISION INVOLVED

14th Amendment, U.S. Constitution

Section 1.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State

> wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

(a) Course of Proceeding & Disposition of the Case Below

This case began in State Court in Brazos County, Texas. It began as a routine divorce case. The case was in the courts for three years before it finally came to trial. During the pre-trial proceedings, the Judge put Avi in jail once (a decision reversed by a Texas Court of Appeals), and held him in contempt on other occasions. (Appendix C&D). A jury heard the case in a trial that lasted seven weeks, and returned findings on the disputed facts. However, the trial judge took over 9 months to enter a judgment in the case. His final decision came only after Avi filed a Petition for Mandamus to force the trial judge to make a decision, and he reversed a majority of the jury findings in a ruling that largely favored the wife. (Appendix B). An appeal to the Texas Court of Appeals followed. That appeal began in the latter part of 2000, but the Court of Appeals did not issue a decision until September of 2003. (Appendix A). Avi asked the Texas Supreme Court to review the case, but his Petition for Review, and his Motion for Rehearing on the Petition for Review were both denied. (Appendix E & F).

(b) Statement of Facts

Avi and Bridget's divorce case began in 1997. What had began as a routine, and uncontested divorce quickly became acrimonious. The presiding judge was Judge John Delaney. His first action on the case was to reverse the uncontested Decree of Divorce entered in December of 1997, and order a new trial. Shortly thereafter, he issued 30 pages worth of temporary orders relating to spousal support and child support. Under Texas law, these affirmative orders to support spouse and children are enforceable by contempt. Judge Delaney ordered Avi to pay Bridget a salary, spousal support, and child support. After only a few months into the case, Avi had not paid Bridget according to Judge Delaney's orders and a contempt motion was filed.

At the first contempt hearing, Judge Delaney made his position in the case clear. He said, in open court, that it was his job to "protect the weak from the strong", and that he was going to send Avi to jail as punishment for not paying his wife. This statement appeared in the local newspaper the next day – even though there was no reporter present to hear the statement. The reporter, though, quoted Judge Delaney for the source of this statement. Judge Delaney ordered Avi to jail on July 7th, 1998 with an oral order but he failed to confirm his order in writing in a timely fashion. The Texas appellate court released Avi from the contempt citation within a short time, and eventually reversed Judge Delaney contempt citation – finding that Judge Delaney had not made a written order of what Avi had done to warrant contempt, and failed to indicate how Avi could purge himself of contempt. Even after the appellate court ordered Avi's release, Judge Delaney waited two days before forwarding the order for release so that Avi could get out of jail.

These early orders set the tone for the remainder of the divorce case. After a litany of unfair comments and an *ex parte* conversation between Bridget's lawyer and the Judge came to light, Avi moved to recuse Judge Delaney on two separate occasions. During one motion, Avi argued that State law required recusal. During the second motion, Avi argued that he was being deprived of Due Process because his case was not being heard by a neutral and detached tribunal. When the divorce became a final judgment and Avi appealed, he appealed, in part, based on the bias of Judge Delaney. The Texas Court of Appeals denied Avi any relief – relying primarily on state law, and holding that Judge Delaney was not really showing antagonism.[1] Avi asked the Texas Supreme Court to rule on the judicial bias question in both his Petition for Review and in his Motion for Rehearing of the Petition for Review. In the Texas Supreme Court, he again argued that he was denied a fair and impartial tribunal.

Judge Delaney clearly was offended by the allegations made in the recusal motions. His response was:

> "I've never witnessed anything that compares to this case in the 25 years I've been practicing law and being a Judge in combination. And I will not soon forget it . . . Behind the scenes you can confer

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1. The Texas Court of Appeals also relied on procedural grounds – saying that Avi did not timely object to each of the events that he thought showed bias or prejudice. This Court has never required this type of procedural tactic to complain of a Due Process violation – especially since many of the events occurred before the trial, many after the trial, and many outside the presence of the jury. Avi brought all of these complaints together in his two motions to recuse Judge Delaney. None of the complaints could fairly be categorized as ones that the trial court was not made aware of.

> with your attorneys and they can counsel you, 'Oh well, this Judge doesn't understand the law.' You can choose who to believe, sir. I believe that the reason you filed the Motion to Recuse me yesterday had nothing to do, or very little to do, with legitimate concerns about what transpired on Saturday morning, but was nothing more but a device and a tactic to avoid today's day of reckoning where you might be held in contempt and sent to jail. Now, you may feel righteous indignation, you and Mrs. Kohn between the two of you over that statement, but it certainly fits the facts. You had all of this prior material that you could complain about available long before yesterday, but you seized on the fortunate for you, you thought, fact that I telephoned Segal on the telephone and then telephoned Kohn on the telephone in rapid succession to come here to Court on Monday to derail this proceeding . . . I choose not to feed the litigation monster by giving you cause to rush off to an appellate court to try to get relief from my order."

When the case finally came to trial, the parties needed seven weeks to put their case before a jury. Even with both sides accusing the other of bad acts and cruel treatment, the jury found that Bridget was guilty of intentional infliction of emotional distress, guilty of fraud, and in breach of contracts. No such findings were made regarding Avi. Judge Delaney completely disregarded these findings, and made his own ruling about the division of property and the custody of the children – just as he had threatened he would do during pre-trial hearings. He had said, "Bottom line is, ultimately, a large part of you, a large part of the issues that affect your

lives in this divorce are going to go through me, and it's not something I relish but it's something you have to wake up to. The jury has a very limited role in a case like this."

Avi consistently complained about the lack of fair treatment, thus preserving that issue for federal review. He made two Motions to Recuse Judge Delaney; he appealed to the Court of Appeals on this ground, and he requested review from the Texas Supreme Court on these grounds. He was denied at each turn, and now seeks relief from this Court.

REASONS FOR GRANTING THE PETITION

Can the comments of a trial judge showing outright favoritism for a party in a family law case become so pervasive and evident that there is a violation of the Due Process Clause of the United States Constitution?

The Due Process Clause of the 14th Amendment cannot realistically provide a perfect trial every time. It also cannot guarantee that every judicial officer will be completely free of any bias or prejudice. But, where a judge displays deep-seated favoritism or antagonism that make fair judgment impossible, his conduct deprives the litigants of the process that they are due in legal proceedings. *See Liteky v. United States*, 510 U.S. 540, 554 (1994). The standard that must be met under the Due Process Clause of the 14th Amendment was stated by this Court in *In re Murchison*, 349 U.S. 133, 136 (1955):

> "A fair trial in a fair tribunal is a basic requirement of Due Process. Fairness of course requires an absence of actual bias in the trial of cases. But

> our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that 'every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the State and the accused, denies the latter Due Process of law.' *Tumey v. Ohio*, 273 U.S. 510, 532. Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.'" *Offutt v. United States*, 348 U.S. 11, 14.

Important to this standard is the mandate that justice satisfy the "appearance of justice". In fact, this Court has noted, on several occasions that ". . . in matters of ethics, appearance and reality often converge as one." *Liteky*, 510 U.S. 565.[2] The burden must rest squarely on the members of the judiciary to insure the appearance of propriety. And, the burden on judges to maintain the appearance of justice is universal in the sense that state statutes cannot ease the task of maintaining the integrity of the judicial system.

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2. The Court quoted these statements in *Liteky*: "Justice must satisfy the appearance of justice, *Offutt v. United States*, 348 U.S. 11, 14 (1954); "Justice should not only be done, but should manifestly and undoubtedly be seen to be done". *Ex parte McCarthy*, 1 K.B. 256, 259 (1923).

The Due Process Clause is concerned with the quality of justice provided by the system, not the quality of the system in disposing of disputes. A highly efficient system of justice is useless if the people do not believe that it provides fair resolutions of their disputes. Given the minimum requirements of Due Process, no state may permit its courts to evidence antagonism or favoritism so extreme that a fair hearing cannot be had. The judge in this case did exactly that, in several ways –

- Judge Delaney's running commentary throughout the case, his advice to the parties reflecting his predisposition of the case, and his warnings about the results – all reflect extreme antagonism against Avi, and obvious favoritism for Bridget.

- *Ex parte* contact with Bridget's lawyer about matters in the case showed a predisposition about important pre-trial matters.

Each separate event poses questionable judicial tactics, but the sum of them makes a violation of Due Process.

The Judge's Running Commentaries

Judge Delaney, early in the case, showed a predisposition wholly inconsistent with a fair hearing of the case on the merits. Here is a sampling of the Judge's comments to the parties:

> "All right, I'm going to let you go into that, but I am going to admonish you to try to restrict the nice person, bad person, good guy, bad guy

testimony here, lest you incur the wrath of this Court, the disfavor that might be reflected unintentionally toward the client that uses this type of unreasonable consumption of Court time. Press on."

"I'm not going to be wrathful. This is not about my wrath. I'm not in the business of withholding and dispensing wrath, as you've characterized it now, repeatedly. I'm in the business of protecting the weak from the strong and trying in small ways to right wrongs."[3]

"I can order this man to do anything that's reasonable with respect to the assets of that corporation up to and including providing this woman the use of any of those vehicles and its perfectly legal to do that."

"Well, this case is a living breathing disaster and a tragedy. It is the worst I have seen in a long, long time. I'm not sure I have ever handled a divorce case in this court in fourteen years that adds up to more of a human disaster than this one."

"I listened very carefully to your evidence back on March 30th, and I tried to construct what I thought was a reasonable plan to, uh, minimize

3. It is worth noting that no reporter was present in the Courtroom when this comment was made, but it appeared on at least two occasions in the local newspaper. Since the reporter was not present in the courtroom, the source of the quotation had to be either the parties or Judge Delaney. The reporter quoted Judge Delaney.

> the financial hardship on all parties and, sadly, that order was treated as something that could be simply ignored, be tossed aside and ignored . . . ignored, not even complied with partially. And that, um, produced predictable disaster for this woman."
>
> "But let me make another speech. I get to divide the property. I'm the one given the responsibility for setting the child support. Bottom line is, ultimately, a large part of you, a large part of the issues that affect your lives in this divorce are going to go through me, and it's not something I relish but it's something you have to wake up to. The jury has a very limited role in a case like this."

Judge Delaney's comments show a lack of impartiality both in substance and in the tone in which they were delivered. And, that lack of impartiality implicates the standards under the Due Process Clause. Avi acknowledges that states are generally permitted to fashion their own rules about disqualification of judges, especially as it relates to bias. *Tumey v. Ohio*, 273 U.S. 510, 523 (1927).

> "It is normally within the power of the State to regulate procedures under which its laws are carried out . . . and its decision in this regard is not subject to proscription under the Due Process Clause unless it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."

Patterson v. New York, 432 U.S. 197, 201-202 (1977). But, this Court has, heretofore, only opined on limited

situations where the Due Process Clause intersects with judicial bias. In *Aetna Life Insurance Company v. Lavoie*, 475 U.S. 813 (1985), the Court held that the Due Process Clause does proscribe a judge from hearing a case where he has a direct, substantial, personal and pecuniary interest – regardless of the application of any state law relating to judicial recusal. In ruling that a direct, pecuniary interest may require disqualification under the Due Process Clause, this Court emphasized the appearance of justice as much as it did the actual bias of the offending jurist. In fact, the Court made clear that it was not required to decide, in *Lavoie,* whether the judge was actually influenced by his personal interest in the case, but only to decide whether the existence of the personal interest of a sitting judge satisfied the "appearance of justice".

If the Court consistently applies the Due Process Clause to other circumstances of judicial bias, the appearance of justice must be equally important. Without any consideration of federal statutes that emphasize the appearance of impropriety, or of Texas statutes that have similar phrasing, the Court should hold that the Due Process Clause envisions not only the best effort of judges to administer justice even-handedly, but the appearance to the citizens that even-handed justice is the rule of our judicial system. If the public perceives that there are cases where judges can express their own personal feelings without the benefit of evidence or legal principles, then the judicial system cannot seen to be true to the concept of justice at all. Instead, the judicial system would simply represent a collection of varying political views on social issues. Those in search of a remedy need only find the judge(s) that appear predisposed to their case, or at least find the judge(s) that are predisposed to reject their opponent.

This Court worked very hard to help practitioners and judges to understand judicial bias and prejudice in *Liteky v. United States*, 510 U.S. 540 (1993). Although that case involved the interpretation of the federal statutory basis for recusal, the case is noteworthy for its clear explanation of what bias or prejudice mean in judicial proceedings.

> "Bias and prejudice seem to us not divided into the 'personal' kind, which is offensive, and the official kind, which is perfectly all right. As generally used, these are pejorative terms, describing dispositions that are never appropriate. It is common to speak of 'personal bias' or 'personal prejudice' without meaning the adjective to do anything except emphasize the idiosyncratic nature of bias and prejudice, and certainly without implying that there is some other 'nonpersonal,' benign category of those mental states. In a similar vein, one speaks of an individual's 'personal preference,' without implying that he could also have a 'nonpersonal preference.' Secondly, interpreting the term 'personal' to create a complete dichotomy between court-acquired and extrinsically acquired bias produces results so intolerable as to be absurd. Imagine, for example, a lengthy trial in which the presiding judge for the first time learns of an obscure religious sect, and acquires a passionate hatred for all its adherents. This would be 'official' rather than 'personal' bias, and would provide no basis for the judge's recusing himself.
>
> Not all unfavorable disposition towards an individual (or his case) is properly described by

> those terms. One would not say, for example, that world opinion is biased or prejudiced against Adolf Hitler. The words connote a favorable or unfavorable disposition or opinion that is somehow wrongful or inappropriate, either because it is undeserved, or because it rests upon knowledge that the subject ought not to possess (for example, a criminal juror who has been biased or prejudiced by receipt of inadmissible evidence concerning the defendant's prior criminal activities), or because it is excessive in degree (for example, a criminal juror who is so inflamed by properly admitted evidence of a defendant's prior criminal activities that he will vote guilty regardless of the facts)." *Liteky*, 510 U.S. at 549-550.

The conduct of Judge Delaney in this case contains many of the characteristics that the Court found indicative of the bias that should be condemned in judicial activity. First, the unfavorable disposition of Judge Delaney is expressed early in the case, with little or no record to support a conclusion that it was deserved. Judge Delaney warned Avi that the judge's wrath would be expressed on the litigant who wasted court time, even if the wrath was "unintentional". A fair conclusion here is that either Avi was already targeted by the Judge, or that the Judge would be unable to control himself at some later date. Later comments by Judge Delaney – that it was his job to "protect the weak from the strong" – also show a judicial temperament that is wrongful and inappropriate. It shows direct favoritism because the job of a judge is not to protect anyone because of their status, but to apply the law to the facts in an even handed manner. Judge Delaney's sympathy for Bridget is apparent when he

describes a period of time where she did not get money for support or for her lawyer's fees as a "disaster" – hyperbole, to be sure, but hardly to be ignored when it is accompanied by a jail sentence. Finally, Judge Delaney's threat or promise that a jury trial would never benefit Avi – since everything has to "go through me" shows an unfavorable disposition that is excessive in degree. Regardless of the true state of Judge Delaney's mind and heart, an observer of the proceedings here could only draw the conclusion that Avi was, indeed, the subject of Judge Delaney's wrath. A reasonable observer would know that it was only a matter of time before Judge Delaney's wrath came to rest on Avi's back – and only a matter of how heavy a load it was going to be. A reasonable observer would not need to hear evidence to know the result in the case, nor would he think that evidence could change the result.

Most importantly, no observer of Judge Delaney in this case would ever want to appear in his court, because it would not be possible to predict what events or conduct might put a litigant on the good side or the bad side of Judge Delaney. A litigant could only hope that Judge Delaney considered him one of the "weak", and that the litigant's opponent was one of the "strong."

The Due Process Clause cannot have tangible application or benefits if it does not remedy this situation. And, lest there be any doubt, Avi's complaint is not the "speculative musings of a losing litigant."[4] The jury in this case eventually returned a verdict that largely favored Avi. The jury found that it was Bridget who inflicted intentional emotional distress, who committed fraud on the community, and who breached

4. *Margoles v. Johns, et al.*, 660 F.2d 291 (7th Cir. 1981).

contractual commitments. None of these findings were made against Avi. When Judge Delaney rejected all of these jury findings, he not only made good on his threat to limit the jury's role in the case, he proved that a neutral and detached fact finder would have provided a different result in the case.

A fair trial in a fair tribunal is a basic requirement of Due Process. *In re Murchison*, 349 U.S. 133, 136 (1955). Parties are entitled to ". . . the cold neutrality of an impartial judge." *United States v. Orbiz*, 366 F. Supp. 628 (DPR 1973). And while this Court has made clear that Due Process protects litigants from a judicial officer with a direct interest in the outcome of the case, it has not explained how the Due Process Clause protects the victims of the unwarranted prejudice or the outright wrath of a judge. This case presents an opportunity to protect not only actual harm, but the perception of our justice system that came from the public display of favoritism by Judge Delaney.

The Ex parte Contact

If Judge Delaney's judicial attitudes were insufficient to incite the appearance of bias or prejudice, his conduct in the middle of the case confirms it. In July of 1999, months before the trial on the merits, Avi had filed a Fourth Motion Contempt against Bridget. According to that Motion, Bridget had moved one of the children outside the jurisdiction of court in violation of the pre-trial orders Judge Delaney had entered. The matter had not been set for hearing, despite Avi's request. In fact, Avi had filed a Petition for Mandamus – asking an appellate court to order Judge Delaney to hear the Motion. Judge Delaney got the Petition for Mandamus on Friday, and on Saturday, he called Bridget's lawyer. Judge Delaney suggested that the pending Fourth Motion for Contempt be heard the following Monday, (since the

Mandamus Petition requested that he set the Motion). Judge Delaney asked if Bridget's lawyer would waive any notice requirements that might otherwise apply. During the conversation, Judge Delaney talked with Bridget's lawyer about whether the motion had merit. Bridget's lawyer conceded that this particular motion did have merit, though he considered the other motions filed by Avi to be "poppycock".

By the time that Judge Delaney informed Avi's lawyer that the Fourth Motion for Contempt against Bridget could be heard on Monday, it was apparent that Judge Delaney and Bridget's lawyer had concluded a rather lengthy and substantive conversation about the case. First, they had apparently talked about letters that had passed between counsel about pending matters. (These are letters that had not been provided to Judge Delaney in the regular course of the case). Second, they talked about the physical location of the child that was the subject of Avi's Fourth Motion for Contempt. (Bridget's lawyer conceded to Judge Delaney that the child had been taken "up north"). And, although sending the child "up north" violated Judge Delaney's orders, he was willing to hear a group of pending motions on Monday, so that the Bridget and the child would not have to "come back down" a second time. If the Judge was going to let Bridget and the child leave after the hearing, and not "come back down", it was apparent that he had already decided that the violation of his orders was not going to result in any sanction for Bridget, nor was he going to strictly enforce his order requiring the child's presence in Texas.[5]

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5. This is a marked contrast to Judge Delaney's attitude toward Avi. On two occasions, Judge Delaney held Avi in contempt for not paying money to Bridget, and put Avi in jail. His orders were reversed, but he was insistent on the parties not "ignoring" his orders.

Avi objected to this *ex parte* contact by filing a Motion asking that Judge Delaney be removed from the case. It was the first matter taken up for hearing on the following Monday. Judge Delaney began almost immediately to recite what happened in the phone call – telegraphing his testimony to Bridget's lawyer. Avi objected to the Judge using this tactic to insure that Bridget's lawyer told the same story about the phone call. But, Judge Delaney persisted. When Bridget's lawyer testified, he essentially could not recall anything about the phone call from a judge on a Saturday morning – just two days earlier – other than that a scheduling issue had been discussed. Judge Delaney refused to concede that he had discussed the merits of any pending matters. But, the words that he admitted to using reflect a discussion far beyond what he was willing to expressly admit. Avi's counsel had not only a vivid recollection of the call to her, but she had taken notes about the call, and was positively shocked by its contents. To her, it was apparent that the matters set for Monday had already been decided by Bridget's lawyer and Judge Delaney during their Saturday call.

A judge who has made his decision outside of the matters heard in court has more than an appearance of bias or prejudice. His personal view has actually affected the outcome of the case. And, it is the affect on the outcome that makes out a violation of the Due Process Clause. "A litigant is denied the fundamental fairness to which he is constitutionally entitled if the judge of his case is unfairly biased against him." *Margoles v. Johns*, 660 F.2d 291, 296 (7th Cir. 1981). Prejudgment based on a prehearing *ex parte* communication is patently unfair, and shows that the tribunal is not free from bias or prejudice. *See United States v. Sciuto*, 531 F.2d 842, 846 (7th Cir. 1976). And, though the record may not contain firm evidence that Judge Delaney had, in

fact, made up his mind about Avi at the time of the *ex parte* contact, the measure of the Due Process Clause is whether sitting on the case then before him "would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true." *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1072) [quoting *Tumey v. Ohio*, 273 U.S. 512, 532 (1927)]. The Due Process Clause "may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way, 'justice must satisfy the appearance of justice.'" *Murchison*, 349 U.S. at 136 (citation omitted). *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986).

Ex parte communications, generally, and this one specifically, are pregnant with opportunity for abuse. Even an experienced and indisputably unbiased trial judge cannot be certain to avoid all the pitfalls inherent in such a situation. It is difficult to contain, much less to anticipate, the direction the conversation will take in such a situation. Unexpected questions or comments can generate unintended and misleading impressions of the judge's subjective personal views – all the more so when all counsel are not present to challenge the statements. Second, any occasion which leads to communication with the one side at a time inevitably risks innocent misstatements and misinterpretations despite the undisputed good faith of the participants. Whatever version of the phone conversations is correct, there is clearly a belief on the part of Avi's counsel that Judge Delaney both discussed the merits of pending matters, and indicated what his decision would be on those matters to Bridget's lawyer. Were anyone able to accurately reconstruct the conversations, it may be that Avi's interpretation of the Judge's comments did not correctly reflect Judge Delaney's intentions. But, there is no

way to determine precisely what was said, or what was communicated. Finally, the failure to have all counsel present during conversations with Judge Delaney and the unavailability of a transcript or full report of the phone calls aggravate the problems of having three persons involved in what amounts to two different conversations. While most lawyers would readily acquiesce in having a conversation with a judge about administrative matters like scheduling a hearing, they would do so only with the understanding that the administrative matters would be the sole topic of discussion. Neither counsel, nor the judge who heard the recusal motion, nor the appellate courts in Texas can be said to have received a full report from Judge Delaney (given the opposing views of what was said, or what might have been said). They could not be fully aware of the scope of the conversation between the lawyers and the judge. While it is, of course, impossible to gauge what part the disputed phone calls and the resulting motions impugning Judge Delaney played in the ultimate result of the case, the combined result of Judge Delaney's running commentary with this disputed call gives rise to serious questions. *See United States v. United States Gypsum Co.*, 438 U.S. 422, 460-462 (U.S. 1978).

CONCLUSION

This case presents an issue of both actual error that needs correction, and an important issue that should be decided. Avi has been actually harmed by the bias of a judicial officer. A neutral fact-finder (the jury here) returned a verdict that was largely in Avi's favor. The judge rejected the jury's findings completely, and imposed his own decision that credited none of the jury's fact findings. Judge Delaney simply imposed his will on the result of this case – because he could.

And, although this Court might be generally inclined to leave the matter of judicial bias to the legislative decisions of the State of Texas, there must be a baseline against which legislative decisions are to be measured. From *Liteky*, one can conclude that States must prohibit judicial officers from hearing cases where they have a direct, personal, substantial and pecuniary interest. Even the appearance of such an interest should result in the assignment of a different judge. But, States still struggle with the type of unfavorable attitudes that are wrongful or inappropriate in their origin, either because the attitude is undeserved, because it comes from an improper source, or because it is excessive in degree. The Court should make clear that this type of judicial bias violates the Due Process Clause as much as personal, pecuniary interest. No system of justice can engender respect if it permits the arbitrary or capricious hearing officer. To say that judicial errors may be corrected on appeal (as the Texas Court did in this case) ignores the reputation and integrity of the system. It is the perception of integrity and reliability of the system that can (and should) be actively protected. The unbiased tribunal is critical to this perception. The Court should, therefore, grant this Petition, and should reverse the judgment of the Trial Court.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE COURT OF APPEALS OF TEXAS, FOURTEENTH DISTRICT, HOUSTON DATED SEPTEMBER 11, 2003

COURT OF APPEALS OF TEXAS FOURTEENTH DISTRICT, HOUSTON

No. 14-00-01505-CV

AVI BART MARKOWITZ,

Appellant,

v.

BRIDGET MARY MARKOWITZ,

Appellee.

September 11, 2003, Judgment Rendered
September 11, 2003, Majority and Concurring Opinions on Rehearing Filed

JUDGES: Panel consists of Justices Yates, Fowler, and Seymore. (Seymore and Fowler, J.J. concurring.) (Yates, J. joins this opinion on the first issue).

OPINION BY: Charles W. Seymore

OPINION:

MAJORITY OPINION ON REHEARING

Appendix A

We withdraw our previous opinion dated April 17, 2003 and substitute this opinion in its place. In six issues, Avi Bart Markowitz appeals the final decree of divorce that dissolved his marriage to Bridget Mary Markowitz and divided their property. We affirm. Accordingly, Avi's motion for rehearing is overruled.

BACKGROUND

Avi and Bridget Markowitz married in 1983. Avi filed for divorce in 1997 and on December 15, 1997, he presented an agreed decree of divorce to Bridget for her signature. Bridget was scheduled for breast cancer surgery the next day. Despite the impending hospital stay, she signed the decree but initialed it "AMW." Later, she testified that the acronym meant "against my will." On December 18, 1997, while Bridget was hospitalized, the court rendered judgment on the parties' agreement and signed the final decree of divorce. Late that afternoon, Bridget called the trial court from her hospital room, claiming (with her husband's attorney also on the line) that she had been coerced into signing the decree. She subsequently retained an attorney and filed a motion for new trial.

Following the grant of a new trial, the trial court entered temporary orders, providing in part for spousal support and a continued salary for Bridget, who had worked as a nurse in Avi's medical practice. Avi did not comply with the temporary orders timely or willingly. Additionally, as the divorce became more contentious, the trial court found Avi in contempt on three occasions and jailed him twice for failure to comply with the temporary orders. During the course of proceedings,

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Avi filed three writs of habeas corpus, two or three motions to recuse the judge, and two petitions for writ of mandamus. There were many other pretrial motions, some involving Bridget's own poor behavior. The jury trial spanned seven weeks during October and November 1999. Post-verdict motions and hearings continued in the same vein of non-cooperation and contentiousness between Avi and Bridget. In total, Avi spent more than $300,000 in attorney's fees, and Bridget's attorney dedicated some $70,000 worth of time to the case. The trial court signed a final judgment on September 20, 2000, and this appeal ensued.

REPORTER'S RECORD

In his first issue, Avi contends that he is entitled to a new trial because the court reporter failed to transcribe and file certain pretrial proceedings, which were recorded electronically. Avi claims that the missing pretrial proceedings would demonstrate he was denied a fair and impartial trial on the merits because of the trial judge's bias. For the reasons set forth in Justice Fowler's opinion, which is the majority opinion on this issue, the court overrules issue one.

ALLEGED JUDICIAL BIAS

In his second issue, Avi contends he was denied a fair and impartial trial because of judicial bias throughout the proceedings. In seventeen pages of his brief, he complains that three years of rulings, as well as comments made by the trial court and Bridget, evidence the trial court's bias against him.

Appendix A

Parties have a right to a fair and impartial trial. *Metzger v. Sebek,* 892 S.W.2d 20, 37 (Tex.App.-Houston [1st Dist.] 1994, writ denied). One of the fundamental components of a fair trial is a neutral and detached judge. *Ward v. Village of Monroeville,* 409 U.S. 57, 62, 34 L. Ed. 2d 267, 93 S.Ct. 80 (1972). A judge should not act as an advocate nor an adversary for any party. *Metzger,* 892 S.W.2d at 38. "To reverse a judgment on the ground of improper conduct or comments of the judge, we must find (1) that judicial impropriety was in fact committed and (2) probable prejudice to the complaining party." *Id.* at 39.

In *Barrientos v. Nava,* 94 S.W.3d 270 (Tex.App.-Houston [14th Dist.] 2002, no pet.), this court considered judicial bias when a trustee was appointed. We wrote as follows:

> The scope of our review is the entire record. *Id.* We note that "'judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge.' " *Dow Chem. Co. v. Francis,* 46 S.W.3d 237, 240, 44 Tex. Sup. Ct. J. 664 (Tex.2001) (citing *Liteky v. United States,* 510 U.S. 540, 555, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994)). Such remarks may constitute bias if they reveal an opinion deriving from an extrajudicial source; however, when no extrajudicial source is alleged, such remarks will constitute bias only if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible. *See Ludlow v. DeBerry,* 959 S.W.2d 265, 271

(Tex.App.-Houston [14th Dist.] 1997, no writ)
(citing *Liteky,* 510 U.S. at 554-56, 114 S.Ct. 1147).

Barrientos v. Nava, 94 S.W.3d at 291-92. In *Barrientos,* the court concluded that the judge clearly held strong opinions about the proposed trustee, but they were based on the testimony and evidence the judge heard and saw during the trial. As such, they were not grounds for improper bias. With this case law in mind, we now turn to Avi's complaints of judicial bias.

First, we consider the trial court's allegedly biased comments. The record reflects various occasions on which the trial court expressed consternation about appellant's conduct. A party must object to a court's improper comment when it occurs in order to preserve error for appellate review. *Dow Chem. Co.,* 46 S.W.3d at 241. Avi did not object to any of the judge's comments during the proceedings in which they were made.[1] Therefore, no error is preserved for our review regarding the trial court's allegedly improper courtroom comments.

Next, we consider the allegedly extrajudicial comment reported in a local newspaper article: "Upon sending Markowitz to jail last week, [Judge] Delaney said he was protecting the weak from the strong. . . . [Judge] Delaney declined to comment Wednesday. . . ." Avi claims the judge's

1. The appellate record does not include transcripts of the pretrial proceedings, particularly the hearings on motions to recuse, and we cannot consider exhibits to Avi's brief as part of the appellate record. *See Till v. Thomas,* 10 S.W.3d 730, 733-34 (Tex.App.-Houston [1st Dist.] 1999, no pet.).

reported comment is an extrajudicial opinion reflecting the judge's bias. Again, this is taken from evidence introduced during a hearing to enforce temporary orders, a transcript **not** made part of the appellate record. We may not consider matters not included in the appellate record. Therefore, no error is preserved for our review regarding this allegedly extrajudicial comment.

Last, we consider Avi's claim that the trial court's rulings establish judicial bias against Avi such that he was denied a fair and impartial trial. Only in the rarest circumstances are judicial rulings demonstrative of the degree of favoritism or antagonism required to show that a fair and impartial trial is impossible. *Liteky,* 510 U.S. at 555; *see In re M.C.M.,* 57 S.W.3d 27, 33 (Tex.App.-Houston [1st Dist.] 2001, pet. denied) (insufficient showing of antagonism in, for example, judge's refusal to permit attorney to read from documents in evidence). Such rulings are generally best brought as grounds for appeal, not as evidence of judicial bias. *See Liteky,* 510 U.S. at 555; *Grider v. Boston Co.,* 773 S.W.2d 338, 346 (Tex.App.-Dallas 1989, writ denied) ("proper remedy was to assign error on the basis of the adverse rulings").

Avi suggests some thirty different rulings reflect the trial court's antagonism toward him. An objecting party, in order to preserve a complaint for appellate review, must get a ruling from the trial court. Tex.R.App. P. 33.1; *see Hou-Tex, Inc. v. Landmark Graphics,* 26 S.W.3d 103, 112 (Tex.App.- Houston [14th Dist.] 2000, no pet.). We have examined the trial record, and in many of Avi's examples of biased rulings, the record contains no ruling or request for a ruling. In several other

instances, objections to testimony were resolved in Avi's favor. These favorable rulings would indicate that the trial judge was attempting to rule on the merits notwithstanding the antagonistic atmosphere between parties and the court. Finally, after carefully examining the clerk's record and trial record for the remaining examples of allegedly biased rulings, we conclude that the trial judge did not exhibit deep-seated favoritism or antagonism that would make fair judgment impossible. *See Dow Chem. Co.*, 46 S.W.3d at 241. Even considering the cumulative effect of all of the judge's comments and rulings, we cannot conclude that they probably caused the rendition of an improper judgment by either influencing the jury to return a verdict it would not have otherwise returned. Nor has it been shown that they impacted the judge's post-verdict rulings. *See Metzger,* 892 S.W.2d at 39.

Accordingly, we overrule issue two.

BREACH OF CONTRACT

In his third issue, Avi contends that the trial court erred in granting judgment *non obstante veredicto* (JNOV) on the jury's finding (Issue No. 11) that Bridget failed to comply with her contractual obligations under the Final Decree of Divorce dated December 18, 1997. He further contends the trial court was obligated to incorporate into the final judgment an award of $115,530 found to be his damages resulting from Bridget's breach of contract. Our disposition of this issue turns on the status of the agreement (recited in the 1997 decree) after the trial court granted a new trial.

Here, our discussion is controlled by one fact: the trial court granted a motion for new trial. While a trial court retains plenary power, it has the authority to grant a new trial after rendition of an agreed divorce. *See Nichols v. Nichols,* 907 S.W.2d 6, 9-10 (Tex.App.-Tyler 1995, writ denied). When a motion for new trial is granted, the original judgment is set aside and the parties may proceed without prejudice from previous proceedings. *See In re Marriage of Wilburn,* 18 S.W.3d 837, 844 (Tex.App.-Tyler 2000, pet. denied); *Long John Silver's Inc. v. Martinez,* 850 S.W.2d 773, 777 (Tex.App.-San Antonio 1993, writ dism'd w.o.j.). Granting a new trial has the legal effect of vacating the original judgment and returning the case to the trial docket as though there had been no previous trial or hearing. *See Pinkley v. Vega,* 768 S.W.2d 473, 475 (Tex.App.-El Paso 1989, no writ) (finding that an order granting new trial vacates former judgment in its entirety); *see also Schintz v. Morris,* 13 Tex.Civ.App. 580, 35 S.W. 516, 519 (Tex.Civ.App.-Austin 1896, orig. proceeding) (noting that a trial court's decision to grant a motion for new trial, thereby setting aside the only judgment that was rendered on the verdict, had "the effect of destroying the life of the verdict for all purposes.").[2]

Avi contends the trial court's decision to grant a new trial did not alter the parties' contractual division of assets

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2. This principle is deeply rooted in Texas law. *See City of San Antonio v. Dickman,* 34 Tex. 647, 651 (1870) ("It is believed to be a well-settled principle, that the granting a new trial in a cause is to reinstate it on the docket as though no trial had been had. . . ."); *Wolf v. Sahm,* 135 S.W. 733, 734 (Tex.Civ.App.1911) ("It is needless to remark that the effect of granting a new trial is to vacate the judgment rendered on the prior one.").

and liabilities. Avi relies on the Texas Supreme Court's acknowledgment that "[a]n agreed judgment should be construed in the same manner as a contract." *Gulf Ins. Co. v. Burns Motors, Inc.*, 22 S.W.3d 417, 422, 43 Tex.Sup.Ct. J. 647 (Tex.2000); *accord McGoodwin v. McGoodwin*, 671 S.W.2d 880, 882, 27 Tex.Sup.Ct. J. 440 (Tex.1984); *Cavazos v. Cavazos*, 941 S.W.2d 211, 214 (Tex.App.-Corpus Christi 1996, writ denied). He also argues that an agreed judgment may stand as a contract even if it falls as an adjudication. *Mackey v. Mackey*, 721 S.W.2d 575, 579 (Tex.App.-Corpus Christi 1986, no writ); *accord Reagan County Purchasing Co. v. State*, 65 S.W.2d 353, 358 (Tex.Civ.App.-Austin 1933, no writ). However, under section 7.006 of the Family Code, the trial court in a divorce proceeding has discretion to approve or reject such agreements in order to ensure a just and right division of the marital estate. Section 7.006 provides:

> (a) To promote amicable settlement of disputes in a suit for divorce or annulment, the spouses may enter into a written agreement concerning the division of the property and the liabilities of the spouses and maintenance of either spouse. The agreement may be revised or repudiated before rendition of the divorce or annulment unless the agreement is binding under another rule of law.
>
> (b) If the court finds that the terms of the written agreement in a divorce or annulment are just and right, those terms are binding on the court.

> If the court approves the agreement, the court may set forth the agreement in full or incorporate the agreement by reference in the final decree.
>
> (c) If the court finds that the terms of the written agreement in a divorce or annulment are not just and right, the court may request the spouses to submit a revised agreement or may set the case for a contested hearing.

Tex. Fam.Code Ann. § 7.006 (Vernon 1998).

The Texas Legislature has mandated the trial court's exercise of special responsibilities regarding the division of assets and liabilities upon dissolution of the matrimonial bond. Texas law requires a finding by the trial court that the terms of a written agreement for the division of assets and liabilities are just and right. *Id.* § 7.006(b). By vacating the original judgment, the trial court clearly withdrew its approval of the terms in the agreement. Additionally, in its Findings of Fact and Conclusions of Law, the trial court concluded that the terms of the agreement were not just and right. Thus, without approval from the trial court, there was no longer a written agreement capable of being enforced.[3]

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3. We acknowledge that the following language is included in subsection (a): "the agreement may be revised or repudiated before rendition . . . *unless the agreement is binding under another rule of law.*" This language might imply that the trial court is bound by the agreement after rendition; however, we do not believe the legislature intended to impede the trial court from placing the parties and the court in *status quo ante* by granting a new trial. This interpretation

(Cont'd)

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In considering whether the agreement in this case is "binding under another rule of law," we are mindful of the line of cases establishing the enforceability of a Rule 11 agreement before or after rendition of a final decree. *See* Tex.R. Civ. P. 11 (in writing, signed by the parties, and filed with the papers as part of the record). However, we believe any cases on this issue that are outside of the family law context do not control.

A Rule 11 agreement is a contract, governed by contract law. *In re Marriage of Nolder,* 48 S.W.3d 432, 434 (Tex. App.- Texarkana 2001, no pet.); *see Padilla v. LaFrance,* 907 S.W.2d 454, 461, 38 Tex.Sup.Ct. 663 (Tex.1995). We acknowledge that agreements incident to divorce become enforceable contracts when they are incorporated into a final decree. *Traylor v. Traylor,* 789 S.W.2d 701, 703 (Tex.App.-Texarkana 1990, no writ). We further acknowledge that agreements under Alternative Dispute Resolution Procedures are enforceable in the same manner as any other written contract. *See* Tex. Civ. Prac. & Rem.Code Ann. § 154.071(a) (Vernon 1997). However, we do not believe our application of section 7.006 of the Family Code in the instant case conflicts with these settled principles. *See In re Ames,* 860 S.W.2d 590, 592 (Tex.App.-Amarillo 1993, no writ) (finding no conflict between section 154.071 and Family Code section

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(Cont'd)
ensures that the trial court will retain statutory authority to determine a just and right division of the marital estate when a new trial is granted. Accordingly, litigants may either draft another agreement or proceed to trial. Here, the trial court observed in its Findings of Fact and Conclusions of Law that any contractual obligations arising from the decree were extinguished when the new trial was granted.

3.631(a) (the predecessor to section 7.006)). Our decision properly ensures that the trial court will retain statutory authority to determine a just and right division of the marital estate as required by section 7.006. After a new trial is granted, the court should have an opportunity to either accept or reject the agreement. *See Keim v. Anderson,* 943 S.W.2d 938, 946 (Tex.App.- El Paso 1997, no writ) (acknowledging that the trial court should have an opportunity to set aside an agreement after rendition of a judgment in order to consider an intervention).

Accordingly, we hold that any contractual obligation arising from the decree was extinguished when the trial court concluded that it was not "just and right." Avi's third issue is overruled.

FRAUD ON THE COMMUNITY

In his fourth issue, Avi contends the trial court erred in failing to award him a share of community assets lost through Bridget's fraud. The jury found that Bridget committed fraud on the community in the amount of $67,800. The trial court held that the jury's answer was advisory and that wrongful disposition of community assets is merely a factor to be considered in the property division. "Because a wronged spouse has an adequate remedy for fraud on the community through the 'just and right' property division upon divorce, . . . there is no independent tort cause of action between spouses for damages to the community estate." *Schlueter v. Schlueter,* 975 S.W.2d 584, 585, 41 Tex. Sup. Ct. J. 1064 (Tex.1998). "Texas recognizes the concept of fraud on the community, which is a wrong by one spouse that the court

may consider in its division of the estate of the parties and that *may* justify an unequal division of the property." *Id.* at 588 (emphasis added).

A trial court has wide discretion in dividing the community estate. *Wright v. Wright,* 65 S.W.3d 715, 716 (Tex.App.-Eastland 2001, no pet.). It may consider fault in the divorce, the spouses' capacities and abilities, benefits that a party not at fault would have derived from continuation of the marriage, business opportunities, education, physical condition of the parties, age disparity, business opportunities, education, size of separate estates, the nature of the property, and waste of community assets. *Schlueter,* 975 S.W.2d at 589; *see Wright,* 65 S.W.3d at 717. On appeal, we presume that the trial court properly exercised its discretion, and we may not disturb the property division absent a clear abuse of discretion. *Wright,* 65 S.W.3d at 717.

The record reflects that the trial court considered Bridget's earning capacity, income, educational level, and the benefits she would have received had the marriage continued. The trial court also considered Avi's excessive personal expenditures during the pendency of the divorce and his refusal to abide by temporary orders (which resulted in protracted enforcement litigation) as actions that reduced the community assets available for division. Lastly, the trial court considered the jury's award of two dollars for Bridget's intentional infliction of emotional distress, the finding that Bridget fraudulently transferred assets, and the finding that neither party had unfairly expended community property without the other's knowledge or consent. In total, the record does not reflect abuse of discretion in the division of the community estate. Therefore, we overrule issue four.

Appendix A

VALUATION

In his fifth issue, Avi contends that the trial court should have granted JNOV on the jury's valuation of his medical practice because there is no evidence that it was worth $321,000. As a subissue, he also argues that the trial court erred in allowing Bridget to testify about the value of the medical practice because she was not designated to testify on that subject.

A no-evidence point may only be sustained when the record discloses one of the following: (1) a complete absence of evidence of a vital fact; (2) the court is barred by rules of law or evidence from giving weight to the only evidence offered to prove a vital fact; or (3) the evidence establishes conclusively the opposite of a vital fact. *Uniroyal Goodrich Tire Co. v. Martinez,* 977 S.W.2d 328, 334, 42 Tex. Sup. Ct. J. 43 (Tex.1998). In determining a no- evidence issue, we consider only the evidence and inferences that tend to support the finding and disregard all evidence and inferences to the contrary. *Catalina v. Blasdel,* 881 S.W.2d 295, 297, 37 Tex. Sup. Ct. J. 857 (Tex.1994). If there is more than a scintilla of evidence to support the finding, the claim is sufficient as a matter of law. *Browning-Ferris, Inc. v. Reyna,* 865 S.W.2d 925, 928, 37 Tex. Sup. Ct. J. 118 (Tex.1993).

At trial, a certified public accountant testified that the value of the medical practice was $221,000, not including attorney's fees paid by Avi from medical practice accounts. Additionally, the evidence showed that Avi paid his attorneys over $100,000 from the medical practice for the divorce. The medical practice's usual accountant testified that such

attorney's fees are not business-related deductions. Further, the evidence showed that this accountant labeled such non-business deductions as "due from shareholder." Given these two amounts, the $221,000 valuation plus in excess of $100,000 in attorney's fees due the medical practice from Avi, there is more than a scintilla of evidence to support the jury's valuation of $321,000 for the medical practice. *See Rathmell v. Morrison,* 732 S.W.2d 6, 19 (Tex.App.-Houston [14th Dist.] 1987, no writ).

Having found sufficient evidence to support the jury's valuation of the medical practice, we need not address whether it was error to allow Bridget to testify about the value. We overrule issue five.

ATTORNEY'S FEES

In his sixth issue, Avi contends that the trial court should have granted JNOV because there is no evidence to support the jury's award of zero in attorney's fees for Avi's successful appeals to the court of appeals and the Texas Supreme Court. He asks us to render judgment of $50,000 for a successful appeal in this court and $20,000 in the event of a successful appeal before the Texas Supreme Court.

However, determination of this issue has no effect on the judgment. "A party has no statutory right to attorney's fees in a divorce case which does not involve a child custody determination." *Beard v. Beard,* 49 S.W.3d 40, 64 (Tex.App.-Waco 2001, pet. denied). A trial court *may* award attorney's fees as a part of the division of the parties' marital estate. *Pletcher v. Goetz,* 9 S.W.3d 442, 448 (Tex.App.-Fort Worth

1999, pet. denied). In this case, the trial court specifically ordered in the final judgment that both sides should bear their own attorney's fees. Avi does not assign error to this portion of the judgment. Thus, it is a moot question whether the trial court should have granted JNOV on the jury's valuation of appellate attorney's fees. We are constrained to address issues in which an actual controversy exists. *See Speer v. Presbyterian Children's Home & Serv. Agency,* 847 S.W.2d 227, 228, 36 Tex. Sup. Ct. J. 511 (Tex.1993). Further, under the rules of appellate procedure, no judgment may be reversed on the ground that the trial court committed an error of law unless the error probably caused rendition of an improper judgment. Tex.R.App. P. 44.1(a). Accordingly, we do not address Avi's sixth issue.

CONCLUSION

We have overruled issues one through five, and issue six is rendered moot. Accordingly, the judgment of the trial court is affirmed.

/s/ Charles W. Seymore
Justice

Appendix A

CONCURBY: Charles W. Seymore Wanda McKee Fowler

CONCUR:

CONCURRING OPINION ON REHEARING

I concur with the majority's disposition of Avi's first issue regarding the missing pretrial reporter's record. However, I would hold that Avi also failed to meet the second and third requisites of Texas Rule of Appellate Procedure 34.6(f). When a reporter's record is lost or destroyed, a party is entitled to a new trial if four requirements are met. Tex.R.App. P. 34.6(f)(1)-(4). First, the appellant must timely request a record. *Id.* Second, for proceedings electronically recorded, a significant portion of the recording must be lost, destroyed, or inaudible through no fault of the appellant. *Id.* Third, the lost or destroyed portion must be necessary to the appeal's resolution. *Id.* Fourth, the parties must be unable to agree on a complete reporter's record. *Id.*

Most significantly, Avi fails to show that the record of pretrial proceedings is "necessary to the appeal's resolution." *Id.; see Young v. Neatherlin,* 102 S.W.3d 415, 423 (Tex.App.-Houston [14th Dist.] 2003, no pet.) (appellant failed to demonstrate that missing portion of record was necessary to resolution of the appeal); *Palmer v. Espey Huston & Assoc., Inc.,* 84 S.W.3d 345, 351-52 (Tex.App.-Corpus Christi 2002, pet denied). In pretrial proceedings, the trial court addressed temporary orders, enforcement of those orders, and discovery disputes. Avi's issue on appeal is whether he received a fair and impartial *trial on the merits,* not error in the pretrial proceedings. I believe that the reporter's record of pretrial

proceedings is not absolutely necessary to determine whether appellant received a fair and impartial trial on the merits. As the court addressed in the opinion on rehearing, we examined the trial record and found Avi was not denied a fair or impartial trial on the merits.

Further, Avi has not completely fulfilled the second requirement of Rule 34.6(f). He must show that the pretrial record is lost, destroyed, or inaudible. Tex.R.App. P. 34.6(f)(2). Avi admits in his brief that he "is unaware of whether these recordings and their log notes have been lost or destroyed." Lastly, I agree with the majority that Avi failed to show that "the parties cannot agree on a complete reporter's record." Tex.R.App. P. 34.6(f)(4).

I would hold that Avi has failed to fulfill three requisites of Rule 34.6(f). Accordingly, Avi is not entitled to a new trial because of the reporter's failure to file the record of pretrial proceedings.

/s/ Charles W. Seymore
Justice

Appendix A

CONCURRING OPINION ON MOTION FOR REHEARING

We join the majority opinion in all respects except for its discussion of the first issue. On the first issue only, this is the majority opinion.

REPORTER'S RECORD

In his first issue, Avi contends that he is entitled to a new trial because the court reporter failed to transcribe and file certain pretrial proceedings, which were recorded electronically. We disagree.

Avi claims that the missing pretrial proceedings would demonstrate he was denied a fair and impartial trial on the merits because of the trial judge's bias.[1] An appellant is entitled to a new trial under the following circumstances:

> (1) if the appellant has timely requested a reporter's record;

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1. Avi provided transcripts of three pretrial hearings and two recusal hearings as exhibits to his brief. However, we cannot consider these exhibits as part of the appellate record. *See* Tex.R.App. P. 34.1, 34.5, 34.6 (contents of appellate record); *Till v. Thomas,* 10 S.W.3d 730, 733-34 (Tex.App.-Houston [1st Dist.] 1999, no pet.); *see also Gabriel v. State,* 973 S.W.2d 715, 719 (Tex.App.-Waco 1998, no pet.) (letter attached to appellate brief not part of the record). We note that in the two recusal motions included in the record, Avi complained about alleged bias shown in the trial court's pretrial comments and rulings. Both motions to recuse were denied. Avi does not assign error to the denial of his motions to recuse.

> (2) if, without the appellant's fault, a significant exhibit or a significant portion of the court reporter's notes and records has been lost or destroyed or—if the proceedings were electronically recorded—a significant portion of the recording has been lost or destroyed or is inaudible;
>
> (3) if the lost, destroyed, or inaudible portion of the reporter's record, or the lost or destroyed exhibit, is necessary to the appeal's resolution; *and*
>
> (4) if the parties cannot agree on a complete reporter's record.

Tex.R.App. P. 34.6(f) (Vernon Special Pamph.2002) (emphasis supplied); *Routier v. State*, 112 S.W.3d 554, 2003 Tex. Crim App. LEXIS 92, 2003 WL 21185818 at *13 (Tex.Crim.App.2003); *Issac v. State*, 989 S.W.2d 754, 756-57 (Tex.Crim.App.1999) (en banc).[2] We find that Avi has not complied with the fourth requirement, showing that the parties could not agree on a complete reporter's record. *See* Tex.R.App. P. 34.6(f)(4). This failure on his part is dispositive of this issue.

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2. This appeal was perfected before the Texas Rules of Appellate Procedure were amended, effective January 1, 2003. Rule 34.6(f) was amended to clarify its application to exhibits and require agreement only as to the portion of the text at issue and to provide that the trial court may determine that a copy of an exhibit should be used even if the parties cannot agree. *See* Tex.R.App. P. 34.6 comments; *compare* Tex.R.App. P. 34.6(f) (Vernon Special Pamph.2002) *with* Tex.R.App. P. 34.6(f) (Vernon 2003).

Avi that he has fulfilled this requirement. *See Kirtley v. State,* 56 S.W.3d 48, 52 (Tex.Crim.App.2001) (holding that a new trial could not be ordered until there was a finding the parties could not agree on complete reporter's record). More importantly, Avi fails to direct us to any part of the voluminous record which shows the parties could not agree on replacements for the lost transcripts of the pretrial proceedings. *See Nguyen v. Kosnoski,* 93 S.W.3d 186, 188 (Tex.App.-Houston [14th Dist.] 2002, no pet.) (finding that an issue unsupported by record reference is waived). In addition, our order of November 11, 2001 granted Avi time to file his brief thirty days after the reporter's record was filed, because he had so many problems in locating and transcribing the record. Nonetheless, the appellant's brief was filed on January 14, 2002, and Avi asked that he be entitled to supplement his brief when the trial court reporter filed additional record transcripts. Although it is now more than a year later, our clerk's office has received no additional transcripts and no agreement, or attempts to agree, on the apparently lost record. The rules of appellate procedure and the case law detail the steps a litigant must take if confronted with a lost record. *See* Tex.R.App. P. 34.6(f); *see also Routier v. State,* 1__ S.W.3d at 5__, 2003 Tex. Crim. App. LEXIS 92, 2003 WL 21185818 at *1 (appeals court had granted motion to correct and clarify the record and remanded case for a trial court hearing); *Gaston v. State,* 63 S.W.3d 893, 899 (Tex.App.-Dallas 2001, no pet.) (trial court made findings of fact); *Doubrava v. State,* 28 S.W.3d 148, 151 (Tex.App.-Eastland 2000, pet. ref'd) (trial court filed conclusion of law after hearing on remand); *Pierre v. State,* 2 S.W.3d 439, 444 (Tex.App.-Houston [1st Dist.] 1999, pet.

ref'd) (judicial findings of fact issued after case abated and remanded). Avi failed to follow these guides and, as a result, he has waived his right to complain of any harm the lost record may have on his appeal.

Accordingly, because Rule 34.6(f) has not been satisfied, Avi is not entitled to a new trial due to a lost, destroyed or unfiled reporter's record of the pretrial proceedings. The first issue is overruled.

/s/ Wanda McKee Fowler
Justice

APPENDIX B — LETTER OPINION OF THE STATE OF TEXAS, DISTRICT COURT, 272ND JUDICIAL DISTRICT DATED MAY 1, 2000

THE STATE OF TEXAS
District Court
272nd Judicial District
Brazos County, Texas

John DeLancy, Judge
jdelancy@co.brazos.tx.us
Kathy Miller, Court Recorder
(409) 361-4220

Laurie Calvin,
Court Coordinator
(409) 361-4219
jcalvin@co.brazos.tx.us
Bob Odstreil, Bailiff
(409) 361-4221

May 1, 2000

Allen J. Segal
Attorney at Law, PC
1722 Broadmoor, Suite 118
Bryan, Texas 77802

Margaret H. Kohn and C. Patrick Meece
MEECE AND KOHN
1716 Briarcrest, Suite 605
Bryan, Texas 77802

RE: Markowitz divorce

This announces the rulings in the above case.

Appendix B

Motions for JNOV

The motions for judgment notwithstanding the verdict that each party filed have been ruled on in the attached copy of a signed order.

Divorce

The marriage will be dissolved on no-fault grounds, despite the fault grounds found by the jury against each party. The court is not bound by a jury finding of fault. *Clay v. Clay*, 550 S.W.2d 730 (Tex. Civ. App.–Houston [1st] 1977.

Children

The agreement regarding the children issues, reached with the benefit of the mediator, will be approved and incorporated in the decree.

Property

The division of property will be as shown in the attached "Bridget Markowitz's Proposed Division of Property" (as modified by my pen and ink entries), with additional changes contained in the following paragraphs.

Judgment and note

The money judgment and promissory note to be payable to the wife will bear interest at 10% per annum, compounded annually, from November 23, 1999. Caselaw requires the use of the interest rate applicable to money judgments. *Kimsey v. Kimsey*, 965 S.W.2d 690 (Tex. Civ. App.–El Paso 1998).

Appendix B

The note will be payable in monthly installments of $3250 (principal of $245,685.88 payable over 10 years in monthly installments at 10% interest yields monthly payment of $3246.76), commencing on the first day of the month following the month in which the judgment becomes final. Caselaw requires the payout to be in the shortest period of time in which the husband is capable of paying. *Collins v. Collins*, 904 S.W.2d 792 (Tex. Civ. App.–Houston 1995, writ denied), reversing payout of $342,000 of 6% interest over 12 years.

The note will contain provisions for a late fee of 5% for any payment made after the 5th day of the month, for acceleration of maturity on default, and a reasonable attorney fee for collection.

The note and judgment will contain provisions for reductions (or increases) in the principal in the event either party discharges a debt awarded to the other by the decree. Neither an increase nor decrease in the amount of the principal will affect the amount of the monthly payments on the note except by agreement of the parties or by further order of the court.

Security

The note will be secured by a security agreement and possessory lien, with the usual provisions for sale of collateral in the event of default, as to all items of art to be awarded to husband but not yet in his possession.

Partial release provisions in the security agreement will permit the husband to obtain possession, and a partial release

of lien (document preparation costs and fees, if any, and transport at his expense), as to an item of art of his choice, based on the following formula: $1.50 reduction in principal will entitle husband to release of lien and possession of $1.00 worth of art, based on valuations in the jury verdict. Payment of entire principal will entitle husband to release of lien and possession as to all remaining art.

Contempt

The decree will order the husband to execute and deliver the note and security agreement, and to make the payments when due, so as to be enforceable by contempt.

Preservation of collateral

The wife will be ordered to take reasonable precautions to preserve for art objects from deterioration or damage, at her expense but will not be obligated to insure them at her expense. The husband may insure the objects at his expense, and if unable to do so for lack of possession, may require the wife to do so at his expense. All art objects retained by the wife to secure the note will remain in Brazos County except by written agreement of the parties or further order of the court.

The court will retain jurisdiction under Chapter 9 of the Family Code to make further orders respecting the enforcement of the division of property, including preservation of collateral.

Appendix B

Tax returns

For 1995 through 1997 the parties will file joint federal income tax returns that will be prepared at the husband's expense. For 1998 through 2000 the parties will file separate returns prepared at their own expense.

Attorney fees

Each party will bear the expense of their own attorney fees, except as provided elsewhere in this ruling, for both trial and appeal.

Temporary orders pending appeal

All temporary orders for spousal and child support will remain in effect until the judgment becomes final, except as modified by provisions in the agreement regarding the children for the reduction of child support.

Motion for contempt

The ruling on the husband's Fifth Motion for Contempt, previously announced in court on February 8, 2000, will be modified as follows: the wife will be found to be in contempt of court, will be assessed a penalty of 15 days confinement in jail, probated for 3 years, and will be ordered to reimburse the husband $750 in attorney fees, and costs of court incurred for filing the motion. Ms. Kohn will prepare an order holding the wife in contempt.

Appendix B

Decree

Mr. Segal will prepare a proposed Decree of Divorce. Costs of court will be assessed against the party incurring same.

Mediator fees

Fees owing to the mediator will be taxed as costs, and will be ordered paid to the mediator within 30 days after signing of the judgment. The court requests that the parties pay their respective shares owing to the mediator as soon as possible, without waiting for the decree.

Sincerely,

s/ John Delaney
John Delaney

xc: Linda McLain

[Proposed Division of Property Not Included]

APPENDIX C — PETITION FOR WRIT OF HABEAS CORPUS GRANTED AND OPINION FILED SEPTEMBER 4, 1998

In The
FOURTEENTH COURT OF APPEALS

NO. 14-98-00780-CV

IN RE AVI BART MARKOWITZ, Relator

ORIGINAL PROCEEDING
WRIT OF HABEAS CORPUS

OPINION

This petition for writ of habeas corpus arises from a divorce suit. Relator, Avi Bart Markowitz, was found in contempt for violating certain temporary orders and sentenced to thirty days in jail and thereafter from "day-to-day" until he purged himself of contempt. Relator contends a seven-day delay between relator's confinement and the court's signature on a written contempt order violated his due process rights. We agree and grant the writ.

I. BACKGROUND

Relator and the real party in interest, Bridget Mary Markowitz ("Bridget"), were divorced on December 18, 1997. In the agreed divorce decree, the court determined custody and visitation of the parties' two children, ordered relator to pay child support, and divided the marital estate. The decree also required that relator continue Bridget's employment as a secretary at his medical practice. On January

16, 1998, Bridget moved for a new trial claiming "the terms [of the divorce decree] and the manner in which [her] signature was obtained [were] unfair." After a hearing, a month later, the trial court granted a new trial. On April 17, 1998, following a hearing, the court signed temporary orders. In these orders, the court changed custody and visitation, reduced relator's child support payments by half and ordered him to pay spousal support and interim attorney's fees. The court also ordered relator to continue Bridget's employment at his medical practice at her regular bi-weekly salary.

In the two months that followed, relator failed to make the required payments under the temporary orders. As a result, Bridget twice moved to enforce those orders by contempt. The court set a show cause hearing for July 6, 1998. On the day of the hearing, relator moved for a continuance. Relator also responded to the contempt motions and sought reconsideration of the court's temporary orders, claiming he was entitled to a reduction of his financial obligations based on Bridget's alleged failure to pay her share of the community debts.

On July 7, 1998, after a two-day hearing, the court *verbally* pronounced relator in contempt. He also signed a commitment order confining relator to the Brazos County Jail for "30 days and thereafter until purged of contempt." The order concludes with, "formal order to follow."

The next day, at relator's request, the court signed a modified commitment order granting relator work release for specified periods. The modified order is nearly identical to the prior order except that it lists the offense as "contempt

of court for non-payment of support, etc." On July 13, 1998, relator filed this petition for writ of habeas corpus, but did not request bond for his release.

On July 14, 1998, the court signed a contempt and commitment order. The following day, relator filed a motion for release on bond and we granted the writ of habeas corpus, releasing relator on bond pending determination of his petition.

II. ANALYSIS

An original habeas corpus proceeding is a collateral attack on a contempt judgment. *Ex parte Rohleder*, 424 S.W.2d 891, 892 (Tex. 1967). The purpose of a writ of habeas corpus is not to determine the guilt of the contemnor, but only to determine whether he was afforded due process of law or whether the order of contempt was void. *Ex parte Gordon*, 584 S.W.2d 686, 688 (Tex. 1979). A court will issue a writ of habeas corpus if the order underlying the contempt is void, *Ex parte Shaffer*, 649 S.W.2d 300, 302 (Tex. 1983), or if the contempt order itself is void. *Gordon*, 584 S.W.2d at 688. An order is void if it is beyond the power of the court to enter it, or if it deprives the relator of liberty without due process of law. *Ex parte Barlow*, 899 S.W.2d 792, 794 (Tex. App.--Houston [14th Dist.] 1995, orig. proceeding).

To punish a person for constructive contempt, due process requires both (1) a written judgment of contempt and (2) a written order of commitment. *See Ex parte Strickland*, 723 S.W.2d 668, 669 (Tex. 1987); *see also Ex parte Barnett*, 600 S.W.2d 252, 256 (Tex. 1980). The two

orders may be combined in the same document. *See Barnett*, 600 S.W.2d at 256; *Ex parte Bagwell*, 754 S.W.2d 490, 492 (Tex. App. Houston [14th Dist.] 1988, orig. proceeding).

As the facts reveal, the court entered both types of orders but not in the same order and not even on the same day. Instead, relator went to jail on July 7, 1998 with only a signed and written *commitment order.* The court did not sign a written contempt order until July 14, 1998. Where the court does not sign a contempt judgment coincidently with a commitment order, the commitment order must contain the elements of a contempt judgment; that is, "the order should clearly state in what respect the court's order has been violated." *See* Tex. Fam. Code Ann. § 157.166 (Vernon 1996); *Ex Parte Afford*, 827 S.W.2d 72, 74 (Tex. App.--Houston [1st Dist.] 1992, orig. proceeding).

The July 7th and July 8th commitment orders alone cannot support relator's confinement because they fail to specifically set out the time, date and place of each occasion relator failed to comply with the temporary orders. *See Alford*, 827 S.W.2d at 74. In spite of this defect, Bridget contends there was no violation of due process because the trial court signed a written contempt order within seven days of relator's confinement. According to Midget, seven days is not too long a gap between the time of commitment and the order of contempt.

The courts of this state have consistently held that a contemnor may be detained by the sheriff or other officer for a *short and reasonable time* while the judgment of contempt and order of commitment are prepared for the

judge's signature. *Barnett*, 600 S.W.2d at 257 (emphasis added).[1] The purpose of the "short and reasonable time" requirement is to prevent the trial court from placing a person in jail indefinitely without any method of purging himself of the contempt and without knowledge of why he is being held in contempt. *See Ex parte Amaya*, 748 S.W.2d at 224, 225 (Tex. 1988). Therefore, the Supreme Court has held that just a three-day delay in signing a commitment order is not a "short and reasonable time" and violates a contemnor's due process rights. *Ex parte Jordan*, 865 S.W.2d 459 (Tex. 1993); *Ex parte Amaya*, 748 S.W.2d 224, 225 (Tex. 1988).

Bridget contends both that this case is not as egregious as *Jordan* and *Amaya* where the relators were confined without any written order. We disagree. One other court has granted a writ of habeas corpus when several days elapsed between the time of commitment with a commitment order

1. In *Barnett*, the court also held that the trial court may correct an error in a prior contempt or commitment order before jurisdiction attaches in a proper court by the granting of a writ of habeas corpus. 600 S.W.2d 357. In that case, the contempt judgment was signed after the trial had lost its jurisdiction and some eighty days after the court signed the commitment order and after the trial court had lost its jurisdiction. *Id.* at 256-57. Thus, Bridget contends the time requirement for signing a written contempt in *Barnett* relates solely to jurisdiction. In other words, she contends the contempt judgment in *Barnett* would have been valid if the trial court had not lost its jurisdiction. We do not read *Barnett* that way. *Barnett* imposes two separate requirements for a valid contempt order: a time requirement that satisfies due process and a jurisdictional requirement that gives the court the authority to act. *See id* at 257. Here, there is no doubt the trial court had jurisdiction to sign the written contempt order on July 14th because it was the day before this court granted the writ and released relator on bond.

and the signing of the contempt judgment. In *Ex parte Morgan*, 886 S.W.2d 829, 831-32 (Tex. App.--Amarillo 1994, orig. proceeding), the court held that a four-day delay between relator's confinement under a written commitment order and the signing of a contempt judgment violated relator's due process rights.[2] Here, like in *Morgan*, relator was confined for both criminal and civil contempt under a written commitment order that did not specify why relator was being held in contempt. *Id.* As a consequence, relator was confined for seven days without any written order specifying why he was being held in contempt. That seven-day delay violated relator's due process rights. *Id.* at 831-32.

As a final attempt to argue that the seven day hiatus between the commitment and the signing of the contempt order was not too long, Bridget relies on Ex parte *Hogan*, 916 S.W.2d 82 (Tex. App.--Houston [1st Dist.] 1996, orig. proceeding), where the trial judge made changes to the contempt order twelve days after the commitment. However, as the discussion below shows, the changes made in *Hogan* were typographical, making the new order akin to a judgment *nunc pro tunc*.

In *Hogan*, one day after it verbally ordered the relator to jail, the trial court signed a contempt judgment that contained typographical errors. 916 S.W.2d at 84. Twelve days later,

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2. The Amarillo court of appeals also held the trial court was without jurisdiction to sign the contempt judgment after the court of appeals had already granted the writ of habeas corpus and released the relator on bond. *Id.* So, as previously noted, there are both time and jurisdictional requirements for a valid contempt judgment.

the trial court corrected the mistakes in the judgment. *Id.*[3] Attacking the validity of his confinement, the relator claimed the orders did not satisfy due process because the second contempt judgment was not signed sufficiently close in time to his confinement. *Id.* at 85. The court of appeals rejected this argument, holding that the relator knew why he was being held in contempt because the court told him why at the contempt hearing and then signed a contempt judgment the next day. *Id.* at 86. The court found that the corrections made to the second judgment thirteen days after relator's confinement were not substantive, but were clerical in nature. *Id.*

In contrast, here, while the trial court told relator at the hearing why he was being held in contempt, the court did not sign a contempt judgment the next day, but waited seven days after relator began his confinement to put it in writing. In short, *Hogan* is distinguishable.

Finally, Bridget maintains that relator's due process rights were not violated by the lack of a contempt order because relator (1) was confined for both civil and criminal contempt and (2) was not attacking the validity of the criminal contempt finding. According to Bridget, under the criminal contempt, relator would have to serve 30 days before he could be released, so it did not matter whether a written order was signed during the first 30 days. We disagree with this logic.

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3. Although the trial court in *Hogan* corrected the judgment after the court of appeals had released the relator on bond, jurisdiction was not an issue. We note, however, that the court treated the corrected judgment as a judgment nunc pro tunc. 916 S.W.2d at 87; *see* TEX. R. CIV. P. 306a.

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Relator was absolutely entitled to a written commitment order and a written contempt order. *See* TEX. FAM. CODE ANN. § 157.166 (Vernon 1996); *Ex parte* Morgan, 886 S.W.2d at 8131-832. His due process rights were violated when he was jailed without these written orders. *Id.*

CONCLUSION

In conclusion, based on the holdings of *Jordan*, *Amaya* and *Morgan*, we hold that the seven-day delay in signing the written contempt order violated relator's due process rights. In light of this holding, we need not address relator's remaining arguments attacking the legality of his confinement. We grant relator's petition for writ of habeas corpus and order relator discharged from custody.

/s/ Wanda McKee Fowler
Justice

Opinion filed September 4, 1998.
Panel consists of Justices Amidei, Hudson and Fowler.
Publish -- TEX. R. APP. P. 47.3(b).

APPENDIX D — ORDER OF THE DISTRICT COURT, BRAZOS COUNTY, TEXAS, 272ND JUDICIAL DISTRICT DATED JULY 14, 1998

IN THE DISTRICT COURT
BRAZOS COUNTY, TEXAS
272ND JUDICIAL DISTRICT

CASE NO *35,930A-272*

IN THE MATTER OF
THE MARRIAGE OF

AVI BART MARKOWITZ AND
BRIDGET MARY MARKOWITZ

AND IN THE INTEREST OF
ISAAC PAUL MARKOWITZ AND
REBECCA EVE MARKOWITZ,
CHILDREN

ORDER HOLDING RESPONDENT IN CONTEMPT OF TEMPORARY ORDER FOR FAILURE TO PAY TEMPORARY CHILD SUPPORT, TEMPORARY SPOUSAL SUPPORT AND INTERIM ATTORNEY'S FEES AND FOR COMMITTMENT

On this 6th day of July, 1998, the Motion for Enforcement by Contempt filed by Respondent/Cross-Petitioner, BRIDGET MARY MARKOWITZ, came on to be heard.

Movant, BRIDGET MARY MARKOWITZ appeared in person and by attorney, ALLEN J. SEGAL, and announced ready.

Appendix D

Respondent, AVI BART MARKOWITZ appeared in person and by attorney, MARGARET H. KOHN and announced ready.

This Court finds that it has jurisdiction over the subject matter and over the parties.

The Court finds that AVI BART MARKOWITZ was personally served with a copy of the Motion for Enforcement and Contempt on May 20, 1998 and that a supplemental contempt motion filed on June 3, 1998 was served on him and his counsel by certified mail.

The Court takes judicial notice of the Temporary Orders pronounced by this Court on March 30, 1998 and administerially signed by this Court on April 17, 1998, the full text of which is attached hereto and incorporated herein for all purposes as Exhibit "A" and the relevant portions of which are as follows:

"Temporary Child Support

IT IS ORDERED AND DECREED that AVI BART MARKOWITZ is obligated to pay BRIDGET MARY MARKOWITZ for the support of REBECCA EVE MARKOWITZ the sum of $1, 500.00 per month, with the first payment being due and payable on the first day of April, 1998 and a like payment due on the first day of each consecutive, successive month until further order of this Court.

Appendix D

FAILURE TO OBEY A COURT ORDER FOR CHILD SUPPORT OR FOR POSSESSION OF OR ACCESS TO A CHILD MAY RESULT IN FURTHER LITIGATION TO ENFORCE THE ORDER, INCLUDING CONTEMPT OF COURT. A FINDING OF CONTEMPT MAY BE PUNISHED BY CONFINEMENT IN JAIL FOR UP TO SIX (6) MONTHS, A FINE UP TO $500.00 FOR EACH VIOLATION, AND A MONEY JUDGMENT FOR PAYMENT OF ATTORNEY'S FEES AND COURT COSTS.

FAILURE OF A PARTY TO MAKE A CHILD-SUPPORT PAYMENT TO THE PLACE AND IN THE MANNER REQUIRED BY A COURT ORDER MAY RESULT IN THE PARTY'S NOT RECEIVING CREDIT FOR MAKING THE PAYMENT.

FAILURE OF A PARTY TO PAY CHILD SUPPORT DOES NOT JUSTIFY DENYING THAT PARTY COURT-ORDERED POSSESSION OF OR ACCESS TO A CHILD. REFUSAL BY A PARTY TO ALLOW POSSESSION OF OR ACCESS TO A CHILD DOES NOT JUSTIFY FAILURE TO PAY COURT ORDERED CHILD SUPPORT TO THAT PARTY.

EACH PERSON WHO IS A PARTY TO THIS ORDER IS ORDERED TO NOTIFY THE OTHER PARTY WITHIN TEN (10) DAYS AFTER THE DATE OF ANY CHANGE IN THE PARTY'S CURRENT RESIDENCE ADDRESS, MAILING ADDRESS, HOME TELEPHONE NUMBER, NAME OF EMPLOYER, ADDRESS OF EMPLOYMENT, OR WORK TELEPHONE NUMBER. THE PARTY IS ORDERED TO GIVE NOTICE OF AN INTENDED CHANGE IN ANY OF

Appendix D

THE REQUIRED INFORMATION TO EACH OTHER PARTY ON OR BEFORE THE 60TH DAY BEFORE THE INTENDED CHANGE. IF THE PARTY DOES NOT KNOW OR COULD NOT HAVE KNOWN OF THE CHANGE IN SUFFICIENT TIME TO PROVIDE 60-DAY NOTICE, THE PARTY IS ORDERED TO GIVE NOTICE OF THE CHANGE ON OR BEFORE THE FIFTH DAY AFTER THE DATE THAT THE PARTY KNOWS OF THE CHANGE.

THE DUTY TO FURNISH THIS INFORMATION TO EACH OTHER CONTINUES AS LONG AS ANY PERSON, BY VIRTUE OF THIS ORDER, IS UNDER AND OBLIGATION TO PAY CHILD SUPPORT OR ENTITLED TO POSSESSION OF OR ACCESS TO A CHILD.

FAILURE BY A PARTY TO OBEY THE ORDER OF THIS COURT TO PROVIDE EACH OTHER PARTY WITH THE CHANGE IN THE REQUIRED INFORMATION MAY RESULT IN FURTHER LITIGATION TO ENFORCE THE ORDER, INCLUDING CONTEMPT OF COURT. A FINDING OF CONTEMPT MAY BE PUNISHED BY CONFINEMENT IN JAIL FOR UP TO SIX MONTHS, A FINE OF UP TO $500 FOR EACH VIOLATION, AND A MONEY JUDGMENT FOR PAYMENT OF ATTORNEY'S FEES AND COURT COSTS.

Temporary Spousal Support

"IT IS ORDERED that AVI BART MARKOWITZ pay BRIDGET MARY MARKOWITZ temporary spousal support of *$1,500.00 per month in equal monthly installments beginning April 9, 1998 and continuing regularly on the first*

day of *each consecutive month until September 9, 1998, and beginning September 9, 1998, that AVI BART MARKOWITZ shall pay to BRIDGET MARY MARKOWITZ the sum of $9,000.00 each month continuing regularly on the first day* of *each consecutive, successive month until further Order of the Court.*

All payments hereunder shall be made to the District Clerk of Brazos County, Texas, P. O. Box 2208, Bryan, Texas 77806 and remitted promptly to BRIDGET MARY MARKOWITZ.

Guaranteed Employment for Respondent

IT IS ORDERED that AVI BART MARKOWITZ maintain BRIDGET MARY MARKOWITZ as an employee of AVI BART MARKOWITZ, MD, PA, during the pendency hereof and that BRIDGET MARY MARKOWITZ be paid her regular salary of $981.20 (net) without deduction, regularly, every two weeks, beginning April 10, 1998, and continuing without interruption each two weeks during pendency hereof.

Interim Attorney's Fees

Petitioner is ordered to pay to Respondent's attorney, Allen J. Segal, not later than April 15, 1998, the sum of *$5,000 for the use and benefit* of *Respondent's attorney."*

The Court finds that the allegations contained in Petitioner's Motions for Enforcement by Contempt are true and that Respondent has contemptuously disobeyed said Order after its pronouncement on March 30, 1998 by failing

and refusing to pay regular salary payments to BRIDGET MARY MARKOWITZ as ordered and by failing and refusing to timely pay temporary child support, temporary spousal support, and interim attorney's fees, through the District Clerk of Brazos County, Texas, P. O. Box 2208, Bryan, Texas 77806, on each of the dates set out below in the amounts indicated:

Interim Attorney's Fees due 4/15/98	$ 5,000.00
Temporary Spousal Support due 5/1/98	1,500.00
Temporary Child Support due 5/1/98	1,500.00
Guaranteed Salary Payment Due 5/8/98	981.20
Guaranteed Salary Payment Due 5/22/98	981.20
Temporary Spousal Support due 6/1/98	1,500.00
Temporary Child Support due 6/1/98	1,500.00
Guaranteed Salary Payment Due 6/5/98	981.20
Guaranteed Salary Payment Due 6/19/98	981.20
Temporary Spousal Support Due 7/1/98	1,500.00
Temporary Child Support Due 7/1/98	1,500.00
Guaranteed Salary Payment 7/3/98	981.20

The Court finds that AVI BART MARKOWITZ had and has the resources from which the foregoing could and can be paid.

The Court finds that on July 7, 1998 in open Court that AVI BART MARKOWITZ paid to BRIDGET MARY MARKOWITZ the regular salary payments then owing, being five (5) payments of $981.20 each and AVI BART MARKOWITZ is entitled to a credit for such payments.

Appendix D

IT IS ADJUDGED that Respondent AVI BART MARKOWITZ, is in contempt of this Court for each violation of the Order of this Court as set out above, and IT IS ORDERED that punishment for each separate violation is assessed at confinement in the County Jail of Brazos County, Texas for 30 days, and Respondent is to serve said sentence day to day, with the sentence for each, violation to run concurrently.

The Court finds that $2,000.00 is a reasonable fee to pay the attorney for BRIDGET MARY MARKOWITZ and that this amount should be and is hereby assessed against Respondent as costs and/or additional interim attorney's fees and/or temporary child support arrearage.

IT IS ORDERED that the Clerk of this Court issue a written attachment or order of commitment to the Sheriff of Brazos County, Texas, take into custody and commit to the jail of Brazos County, Texas, Respondent AVI BART MARKOWITZ, who is to be confined in accordance with this judgment of contempt or until Respondent is otherwise legally discharged.

IT IS THEREFORE ORDERED that the Sheriff of Brazos County, Texas, take into custody and commit to the jail of Brazos County, Texas, Respondent AVI BART MARKOWITZ, who is to be confined in accordance with this judgment of contempt or until Respondent is otherwise legally discharged.

Appendix D

The Court further finds as a prerequisite to coercive contempt that Respondent is presently able to pay the $14,000.00 arrearage due and the $2,000 in attorney's fees awarded.

IT IS FURTHER ORDERED that Respondent AVI BART MARKOWITZ, shall continue to be confined from day to day in the county jail of Brazos County, Texas, after serving the sentence set out above, but not in excess of six (6) months from July 7, 1998, until Respondent has performed each and every one of the following acts:

1. Paid $14,000.00 to Movant through the District Clerk of Brazos County, Texas, P. O. Box 2208, Bryan, Texas 77806, as temporary child support, temporary spousal support and interim attorney's fees.

2. Paid $2,000.00 as attorney's fees awarded as costs and/or additional temporary child support arrearage directly to the attorney for Movant at his business address, 1722 Broadmoor, Suite 118, Bryan, Brazos County, Texas 77802.

SIGNED this 14 day of JULY, 1998.

[stamped]
ORIGINAL SIGNED BY
JOHN DELANEY
JUDGE PRESIDING

APPENDIX E — LETTER FROM THE CLERK OF THE SUPREME COURT OF TEXAS STATING DENIAL OF PETITION FOR REVIEW DATED JANUARY 30, 2004

THE SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711
(512) 463-1312

January 30, 2004

Mr. C. Patrick Meece
Meece & Associates
1716 Briarcrest Drive,
Suite 605
Bryan, TX 77802

Mr. Allen Segal
1722 Broadmoor,
Suite 118
Bryan, TX 77802

RE: Case Number: 03-1146
Court of Appeals Number: 14-00-01505-CV
Trial Court Number: 35,930A-272

Style: AVI BART MARKOWITZ
v.
BRIDGET MARY MARKOWITZ

Dear Counsel:

Today, the Supreme Court of Texas denied the petition for review in the above styled case.

Appendix E

Sincerely,

s/ Andrew Weber
Andrew Weber, Clerk
by Nancy J. Vega, Chief Deputy Clerk

cc: Mr. Marc Hamlin
Mr. Ed Wells

APPENDIX F — LETTER FROM THE CLERK OF THE SUPREME COURT OF TEXAS STATING DENIAL OF MOTION FOR REHEARING DATED MARCH 26, 2004

THE SUPREME COURT OF TEXAS
Post Office Box 12248
Austin, Texas 78711
(512) 463-1312

March 26, 2004

Mr. C. Patrick Meece
Meece & Associates
1716 Briarcrest Drive,
Suite 605
Bryan, TX 77802

Mr. Allen Segal
1722 Broadmoor,
Suite 118
Bryan, TX 77802

RE: Case Number: 03-1146
Court of Appeals Number: 14-00-01505-CV
Trial Court Number: 35,930A-272

Style: AVI BART MARKOWITZ
v.
BRIDGET MARY MARKOWITZ

Dear Counsel:

Today, the Supreme Court of Texas denied the motion for rehearing of the above-referenced petition for review.

Appendix F

Sincerely,

s/ Andrew Weber
Andrew Weber, Clerk
by Claudia Jenks, Chief Deputy Clerk

cc: Mr. Marc Hamlin
Mr. Ed Wells